KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

STEVEN A. AUGUSTINO
DIRECT LINE: (202) 955-9608
EMAIL: saugustino@kelleydrye.com

November 11, 2004

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, WC Docket No. 04-313

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice of a November 9, 2004 *ex parte* meeting with General Counsel's office, in the proceeding identified above. Participants from the General Counsel's office were: John Stanley, Christopher Killion, Paula Silberthau, and Jeffrey Dygert. William Scher of the FCC's Wireline Competition Bureau was also present. In attendance on behalf of the Loop and Transport CLEC Coalition were: James Falvey, Xspedius Management Company LLC; Christopher McKee, XO Communications, Inc.; and Brad Mutschelknaus and Steven Augustino of Kelley Drye & Warren LLP.

The CLECs discussed the legal issues raised by the remand in *USTA II*. The attached handouts summarize the matters discussed.

This notice is being filed electronically through the Commission's ECFS system.

Sincerely,

Steven A. Augustino

SAA:pab

DC01/AUGUS/228953.1

... CLEC COALITION
... ESENTATION

Birch Telecom, Inc.
Broadview Telecom, Inc.
Eschelon Telecom, Inc.
Grande Communications, Inc.
KMC Telecom Holdings, Inc.
NuVox Communications
SNiPLiNK, LLC
TalkAmerica, Inc.
Xspedius Communications, LLC
XO Communications, Inc.

November 9, 2004

USTA II PERMITS NATIONWIDE FINDINGS OF IMPAIRMENT IF THE FACTUAL CIRCUMSTANCES DO NOT VARY DECISIVELY

- *USTA I* questioned market-wide impairment findings only where the element in question is "significantly deployed on a competitive basis" even if not "ubiquitous." *USTA I* at 422
- Nationwide findings of impairment for DSO loops and for subloops have been allowed to stand
- *USTA II* acknowledged that the Commission can proceed by "broad national categories" where:
  - (i) the evidence indicates that markets do not "vary decisively (by reference to its impairment criteria)"; OR
  - (ii) the FCC explores the "possibility of more nuanced alternatives and reasonably reject[s] them"; OR
  - (iii) the nationwide rule is rational, and any impermissibly broad elements can be cured by a "safety valve" waiver or exception procedure. *USTA II* at 570-71

DE MINIMUS COMPETITIVE MARKET ENTRY DOES NOT FORECLOSE A NATIONWIDE IMPAIRMENT FINDING

- *USTA II* acknowledged the "inevitability of *some* over- and under-inclusiveness" in the Commission's unbundling rules. *USTA II* at 570
- FCC unbundling criteria must "track[] relevant market characteristics and captur[e] significant variation." *USTA II* at 563
- *USTA II* makes clear that the Commission is free to "take into account such factors as administrability", presumably such as the canvassing of millions of individual commercial buildings
- Conclusion: If the costs to the Commission and affected parties of a granular inquiry exceed the benefit of "getting it right" in all cases, then the Commission may balance the competing factors in favor of a nationwide impairment finding

USTA II DOES NOT REQUIRE THE FCC TO ABANDON THE ROUTE SPECIFIC APPROACH

- *USTA II* noted that "any process of inferring impairment (or its absence) from levels of deployment depends upon a sensible definition of the markets in which deployment is counted." *USTA II* at 574
- *USTA II* agreed that the FCC explained why deployment on a similar route "should not be sufficient to establish competition is possible." *USTA II* at 575
- Court allowed the FCC to compare the "error costs" (both false positives and false negatives) associated with alternative market definitions. *USTA II* at 575
- Court also cautioned that "it may be infeasible to define the barriers to entry in a manageable form, *i.e.,* in such a way that they may usefully be applied to MSAs (or other plausible markets) as a whole." *USTA II* at 575
- Conclusion: A route specific approach need not be perfect. The FCC may reject alternatives as infeasible or impracticable.

THE FCC MAY CONCLUDE THAT SPECIAL ACCESS IS IRRELEVANT TO ITS IMPAIRMENT ANALYSIS

- *USTA II* considered a specific example – CMRS – with specific factual assumptions, i.e., that competitors have access to inputs at rates "that allow competition not only to survive but to flourish." *USTA II* at 575-76
- The court instructed the FCC "to consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired," but did not mandate that special access be given any particular weight. *USTA II* at 577
- In particular, *USTA II* agreed that
    - The risk of giving ILECs unilateral power to avoid unbundling is "undeniable"
    - Identifying when a tariffed rate gets so high as to cross the "impairment" threshold "might raise real administrable issues" and
    - Consideration of tariffed services might allow ILECs to "evade a substantial portion of their unbundling obligation under subsection 251(c)(3)."
- Therefore, the Court explicitly acknowledged that "on an appropriate record the Commission might find impairment even when services were available from ILECs outside [of section 251(c)(3)]." *USTA II* at 577

SPECIAL ACCESS IS NOT AN ECONOMIC ALTERNATIVE FOR WIRELINE CLECs

- Special access is priced well above UNE rates
  - Month-to-month rates should be used for an apples-to-apples comparison
  - Even with discounts, special access rates are much higher than UNEs
  - Special access rates as a whole generate enormous profits for the RBOCs, thereby proving they retain significant market power
  - If UNEs were eliminated, the RBOCs would increase special access rates above current levels
- Use of special access by some CLECs/IXCs is not proof that UNEs can be eliminated
- Robust competition in the wireless market, where carriers rely on special access, proves nothing about the risk to CLECs if they were forced to rely on special access

USE OF SPECIAL ACCESS BY ISOLATED CLECs IS NOT EVIDENCE OF NON-IMPAIRMENT

- Time Warner Telecom reports that its reliance on special access:

  - Is preventing it from constructing its own facilities

  - Has only proven economically feasible because the existence of cost-based UNE pricing has provided leverage to negotiate volume and term discounts

  -May no longer be available, since RBOCs have raised special access rates since the release of the *USTA II* decision [*Time Warner Telecom Comments*, pp. 13 & 18]

- Carriers that are serving large enterprise customers use special access because of problems with "qualifying" their services for use of UNEs

- These carriers have been protected against price squeezes until recently when the 271 restrictions on the RBOCs were removed

RELIANCE ON SPECIAL ACCESS BY CMRS CARRIERS IS NOT COMPARABLE TO USE OF SPECIAL ACCESS BY WIRELINE CLECS

- CMRS carriers provide their own wireless loops
- ILEC facilities represent a tiny share of the CMRS carriers' cost of service
- ILEC CMRS affiliates compete out-of-region, reducing the incentive to discriminate
- CMRS providers have much stronger balance sheets/income statements than wireline CLECs
- Operating margins for CMRS exceed those for wireline local exchange services
- Demand for wireless services is growing far faster than demand for wireline local services